

STATEMENT

OF

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FOR

THE FINANCIAL SERVICES ROUNDTABLE  
&  
BITS

BEFORE THE

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## **TESTIMONY OF LOUIS F. ROSENTHAL, ABN AMRO North America Inc.**

Good morning, Mr. Chairman and Members of the Subcommittee. I am Louis F. Rosenthal, Executive Vice President at ABN AMRO North America Inc. I am pleased to appear before you today on behalf of The Financial Services Roundtable (The Roundtable) and BITS.

The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. BITS was established in 1996 as a not-for-profit industry consortium and a sister organization to The Roundtable -- we share many of the same members. BITS is not a lobbying organization; instead, it serves as a business and technology strategy group for CEOs in the financial services industry.

I want to begin by commending the Members of this Subcommittee, and indeed all Members of the 106<sup>th</sup> Congress, for passing the E-SIGN Act. E-SIGN represents the kind of supportive, yet minimalist, legislation that is needed to encourage and facilitate the continued growth of electronic commerce in the United States. It levels the playing field between electronic and paper-based methods of doing business by granting legal recognition to electronic signatures, contracts and records, and creates a consistent and uniform legal environment for electronic commerce by preempting state laws. As a result, it provides businesses with the necessary confidence and legal certainty to offer their customers cost-effective and innovative electronic services and products.

Perhaps the most important principles embodied in E-SIGN are those of party autonomy, technology neutrality, and uniformity. For the most part, E-SIGN allows the parties to electronic commercial transactions to decide for themselves how they wish to do business and to structure their business relationships in the manner most appropriate to their needs. By not prescribing standards or mandating the use of any particular technology, E-SIGN permits parties to select from a broad array of electronic methods for doing business, thus helping to ensure that technological innovation will continue to flourish. Finally, by

preempting inconsistent state laws, E-SIGN enables businesses to offer electronic services and products to their customers on a nationwide basis without having to worry whether their contracts and relationships will be legally recognized and enforced.

Until very recently, the financial services industry has been implementing the comprehensive provisions of the Gramm-Leach-Bliley Act. Nevertheless, BITS and Roundtable member companies have also been working to implement E-SIGN and to expand the types of on-line services and products we offer our customers. Examples of some of the opportunities our members now offer or are exploring include: opening and maintaining retirement and brokerage accounts online; offering, selling and servicing insurance products (except for the termination or cancellation of benefits) over the Internet; online mortgage and other consumer loans; account aggregation services; credit facility services; contract closing and archival services; secure document storage and retrieval, such as in electronic vaults; and a variety of business to business (B-to-B) and business to consumer (B-to-C) transactions.

Shortly after E-SIGN was passed, BITS created an E-SIGN Working Group to assist our members in addressing these issues on a cross-industry basis. I am especially pleased to be here as the Chairman of this Working Group, which consists of approximately 50 member BITS and Roundtable companies. We also formed an E-SIGN Industry Guidelines Subgroup, which has developed a matrix of top-priority industry applications for B-to-B, B-to-C, and internal products that could be used in conjunction with E-SIGN. Some of the issues being addressed by the Subgroup include levels of risk, process controls, legal and regulatory issues, and document archival requirements.

Since its inception, the E-SIGN Working Group has served as a valuable discussion forum and information clearinghouse regarding the approaches and steps being taken by financial services companies, government entities, and technology providers to implement E-SIGN. Through these meetings, we have identified a number of challenges to the successful implementation of E-SIGN. These include complying with E-SIGN's consumer consent requirements, the interaction between E-SIGN and state enactments of

the Uniform Electronic Transactions Act (“UETA”), and the manner in which federal regulatory agencies have interpreted and applied Section 104 of E-SIGN, which outlines the boundaries of their interpretive authority.

Our members do not necessarily see these challenges as roadblocks preventing them from going forward, but rather as hurdles to address so that they do not threaten their ability to provide the kind of streamlined and cost-effective services their customers want and expect. To a large degree, whether these hurdles prove to be major problems or simply minor irritants depends on how E-SIGN is interpreted and applied. If it is broadly interpreted, with common sense and in line with its underlying purpose of facilitating electronic commerce, we believe these hurdles can be overcome without undue burden. If, however, it is interpreted narrowly and restrictively, they could well interfere with our members’ ability to take full advantage of E-SIGN’s promise.

#### Consumer Consent Requirements

As the Subcommittee is no doubt aware, E-SIGN contains fairly complex consumer consent requirements for the electronic delivery of required written disclosures. Consumers must be provided with a clear and conspicuous statement containing a number of mandatory disclosures, after which they must affirmatively consent to receiving information in electronic form. In addition, consumers must either consent or confirm their consent electronically in a manner that “reasonably demonstrates” that they can receive the information in the form in which it will be provided, for example, by e-mail or in HTML format on a web site.

Our members fully support the concept of informed consumer consent to electronic delivery of information, and all would build meaningful consent processes into their electronic offerings regardless of whether it were required by E-SIGN. Unfortunately, the E-SIGN consent requirements go beyond ensuring that consumers are afforded the same level of protection in the electronic world as in the paper world, and instead impose requirements that have no equivalent in the paper world. This is particularly true with

respect to the “reasonable demonstration” requirement, which has emerged as posing the most significant practical challenge to fully implementing E-SIGN.

E-SIGN does not define what is meant by a “reasonable demonstration,” and firms have been working diligently to come up with real-world solutions that meet both E-SIGN’s consumer protection goals and its underlying purpose of facilitating electronic commerce. In our view, if this requirement is interpreted broadly and with common sense to permit consumers to demonstrate their ability to receive electronic documents in a variety of ways, the burden it imposes will likely be manageable. If narrowly construed, the burden could well impede the use of electronic delivery in the future.

Even if construed broadly, however, the reasonable demonstration requirement poses particularly difficult challenges when firms interact with consumers both through electronic and non-electronic means (which most of members do). For example, if a consumer wishes to open an account at a firm’s offices or by telephone, and at the same time consents to receive subsequent disclosures through electronic communications, both the consumer and the business must go through the added step of confirming electronically that the consumer can receive the disclosures. This is true even if the disclosures are to be made through e-mail and the consumer gives the business an e-mail address as part of the paper-based consent process. It is also true even if the disclosures are to be made in HTML format on the firm’s web site, and the consumer assures the firm that she or he has Internet access, has previously visited the firm’s web site, and is fully capable of viewing HTML documents.

Prior to E-SIGN, some federal agencies allowed electronic delivery if firms obtained their customers' informed consent. These agencies provided general guidance as to what might constitute informed consent, but did not impose requirements such as “reasonable demonstration.” As a result, consumers were adequately protected, while firms had the necessary flexibility to design their electronic offerings to meet practical realities. Congress may wish to reconsider whether these types of consent regimes are better suited to fulfilling E-SIGN’s goals and to enabling firms to provide their customers with the

type of efficient and convenient online services they demand. This may be particularly appropriate in the case of firms, such as our members, that do business in highly regulated industries.

### Preemption

By preempting inconsistent state law, E-SIGN creates a uniform national framework for the use of electronic signatures, contracts and other records. E-SIGN does, however, authorize states to legislate in this area if they meet certain requirements in Section 102(a). Although the precise scope of Section 102(a) has been the subject of debate, it clearly allows states to adopt the Uniform Electronic Transactions Act (UETA) in the form that was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws (NCCUSL). As a result, over 20 states have enacted uniform versions of UETA that are consistent with E-SIGN. For example, Illinois is amending its electronic commerce law with language taken verbatim from E-SIGN, and Michigan has used virtually identical language in its adoption of UETA.

Other states, however, have adopted non-conforming versions of UETA. In addition, some commentators have suggested that the preemptive scope of E-SIGN is extremely narrow and that the states continue to have significant leeway to pass laws that discriminate against and impose restrictions on electronic contracts and signatures. At this point, these issues are somewhat theoretical, and they may well end up being resolved in the courts. Nevertheless, we urge Congress to pay close attention to how states are reacting to E-SIGN, and to take appropriate action if states pass laws that threaten to undermine it.

Our members are also greatly concerned by the need for uniformity in the international marketplace. We have spent some time reviewing the laws of our trading partners, and there are inconsistencies in the laws of sovereign countries that could impede implementation globally. However, as is the case in areas mentioned previously, it is too early to tell what, if any, disruption these inconsistencies may cause, and what, if any,

recommendations we would have for lawmakers. In the interim, we urge Congress to ensure that the government takes all necessary steps to implement the provisions of Title III of E-SIGN, which outlines the principles to guide the use of electronic signatures in international commerce.

#### Regulatory Interpretations

Finally, our members are concerned that some federal regulatory agencies are interpreting E-SIGN in an overly restrictive manner. We urge Congress to continue to review agency interpretations, along with the OMB Guidance on which many of them are based, to ensure regulations implementing E-SIGN are consistent with the goals of the Act.

#### Conclusion

Once again Mr. Chairman, the Roundtable and BITS congratulate Congress on passing E-SIGN. As technology evolves, we will continue to rely on this landmark legislation to develop new and improved ways to better serve their customers.

While the Act has some provisions that make its implementation cumbersome, we are not proposing that Congress re-open E-SIGN. Once our members and our customers have a chance to operate under the Act for a while, The Roundtable may have proposals to bring to the Committee.

At the present time, however, The Roundtable believes that the marketplace should be allowed to come up with practical methods for implementing the Act. We also would urge Congress to remain watchful that its provisions are not being restrictively interpreted and applied to frustrate its underlying purpose of removing barriers to electronic commerce.

On behalf of both BITS and The Roundtable, Mr. Chairman, thank you for the opportunity to testify before you today.